
(1948) 12 OHC CK 0002
In the Orissa High Court
Case No : S.J.C. No. 21 of 1948

Banshidhar Onkarmal

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 06-12-1948

Acts Referred:

Income Tax Act, 1922 — Section 10, 10(1), 10(2)

Citation : AIR 1952 Ori 109

Hon'ble Judges : Ray, C.J.;Narasimham, J

Bench : Division Bench

Advocate : B.N. Mohanti, for the Appellant; G.C. Das, for the Respondent

Judgement

Narasimham, J.—The question that has been referred by the Income Tax Appellate Tribunal, Calcutta branch, Patna, to us for opinion is as follows:

"Whether, in the circumstances of the case, the sum of RS. 8675/- is allowable either as a trading loss or an expenditure laid out or expended wholly and exclusively for the purposes of the business within the meaning of Section 10(2) (xii) of the Act" (Presumably Section 10 (2) (xii) is an error for Section 10 (2) (xv).

2. The facts found by the Tribunal are these:

3. The assessee carries on the business of selling yarn, speculating on cotton and money lending. He claimed deduction of Rs. 8,675/- in respect of the accounting year commencing from 21-10-1941 and ending on 8-12-1942 on the ground that the said sum was stolen from the iron-safe inside his shop by one Jhaharmal who was a relation of the assessee and who was also working as the accountant of his firm during the year in question. The shop of the assessee used to be closed at about 8 P.M. and the iron safe containing the cash used to remain inside the shop. It was found by all the Income Tax authorities that the said Jhaharmal secured the keys of the shop after 8 P.M., entered the shop at about 10 P.M. opened the iron-safe and removed Rs. 8995/-.

4. On these facts the question arises as to whether the assessee can claim a deduction of the sum stolen, either under the general provisions of Sub-section (1) of Section 10 or under Clause (xv) of Sub-section (2) of that section. There is no express provision in the Indian Income Tax Act authorising such deduction but Mr. Monanti has relied on some decisions in which such losses have been allowed on general principles of computation of profits.

5. Mr. Mohanti's main contention is that the theft was committed by the accountant who was an employee of the assessee and that there was no material distinction between embezzlement by an employee of an assessee or by theft by such an employee so far as deduction for the purpose of estimating the profits is concerned. He relied, on "*Jagarnath v. Commr. of income tax*", 4 Pat 385. Where it was held that a sum embezzled by an employee in the course of the business was a loss incidental to the conduct of the business and should be deducted in calculating the assessable income. The correctness of this decision has been doubted in a later Patna decision reported, in *Mulchand Hiralal Vs. Commissioner of Income Tax*, where the facts found were that some of the money of the assessee was stolen from an employee of the assessee while it was being sent to the Bank. But the loss did not occur in the year of accounting and consequently it was unnecessary to consider whether the loss was deductible from the total profits. Therefore the observations of the learned Judges regarding the correctness of 4 Pat 385 were admittedly in the nature of obiter dicta. In the present case, however, it is unnecessary to consider which of the two views is correct because even on the basis of the earlier Patna decision 4 Pat 385 Mr. Mohanti's contention cannot be supported. It cannot be said that the theft which occurred after the close of the shop was committed by the accountant in the course of his employment or else that the theft was incidental to the conduct of the business. In fact, there is hardly any distinction between the case of a theft of this type committed by an employee or servant or the owner on the one hand and by an ordinary burglar on the other. The fact that he was an employee merely facilitated the commission of the theft by giving him access to the keys. The position might have been quite different if the theft had occurred during office hours, prior to the crediting of the sum to the account of the employer. This case is somewhat similar to a Lahore case reported in "*Assessment of Income Tax v. L.N. Gadodia & Co.*" AIR 1935 Lah 53.

6. The aforesaid view is supported by the following observations of Rowlatt J. in "*Curtis v. J & G. Doldfield Ltd.*" (1925) 9 Tax Cas 319.

"I think, with Mr. Lattier, that if you have a business in the course of which you have to employ subordinates, and owing to the negligence or the dishonesty of the subordinates, some of the receipts of the business do not find their way into the till or some of the bills are not collected at all, or something of that sort, that may be an expense connected with and arising out of the trade, in the most complete sense of the word. But here that is not the case at all. This gentleman was the Managing Director of the Company, and he was in charge of the whole

thing, and all we know is that in the books of the company, which do exist, it is found that moneys went through the books into his pocket. I do not see that there is any evidence at all that there was a loss in the trade in that respect, it simply means that the assets of the company, moneys which the company had got and which had got home to the company, and he took them out. It seems to me that what has happened is that, he has made away with receipts of the Company dehors the trade altogether in virtue of his position as Managing Director in the office, and being in a position to do exactly what he likes".

7. Mr. Mohanti has placed some reliance on the dissentient judgment of Anantakrishna Ayyar J. in *Ramaswami Chettiar and Others Vs. Commissioner of Income Tax*, . But the facts of that case are clearly distinguishable. There the sole business of the assessee was money-lending and the cash mat was stolen was considered by Anantakrishna Ayyar J. to be part of the stock-in-trade. The majority of the Judges, however, held that the theft could not be said to be a loss incidental to the conduct of the business. For the purpose of this case, however, it is not necessary to discuss the relative merits or minority view and the majority view. It is sufficient to note that from the facts as found it cannot, by any stretch of imagination, be held that the theft of the money by the employee was a loss incidental to the business of the assessee. That is to say, such a loss cannot be resumed as likely to occur having regard to the peculiar risks attendant upon the conduct of the business of the assessee.

8. Mr. Mohanti next contended, that so far as the money-lending portion of the business of the assessee is concerned a portion of the sum that was stolen must be held to be part of the stock-in-trade and deduction should be allowed for the sum. But on this question we are bound by the finding on facts arrived at by the Tribunal. The finding is as follows:

9. There is no evidence that the money kept in the safe was the stock-in-trade of the money-lending business and not his capital.

10. I would, therefore, answer the question in the negative and say that the sum of Rs. 8675/- is not allowable either as a trading loss or as an expenditure laid out or expended wholly and exclusively for the purposes of the business within the meaning of Section 10(2) (xv) of the Income Tax Act.

11. The assessee should pay costs to the Commissioner of Income Tax. Hearing fee is fixed at Rs. 100/-.

Ray, C.J.

12. I entirely agree. In course of the argument it has been brought to our notice that the later case of *Mulchand Hiralal Vs. Commissioner of Income Tax*, has either overruled or doubted the correctness of the earlier case of the self-same Court in the case of "*Jagannath Therani v. Commr. of income tax*", 4 Pat 385, I do not think such a contention is entertainable. It is unconstitutional for one Division Bench either to overrule or to doubt the correctness of the decision of

another Division Bench of the same Court. What is constitutionally permissible is to distinguish it on facts. Besides, what has been laid down as principle of law in the case of "Mulchand Hiralal v. Commr. of income tax", has been so done as an obiter dictum. His Lordship Courtney-Terrell C. J., before dealing with question of law observed "In my opinion the decision of the commissioner of Income Tax that the loss (by theft) did not occur in the year of accounting (1932-33) is fatal to the contention of the assessee". This leads me firmly to the clearest possible inference that any further question of law did not arise for consideration in that case; secondly, if I may say so, with great respect, his Lordship has proceeded upon the assumption that the deduction claimed on account of theft or embezzlement; can be claimed only as an allowance permitted in the specific provision of Sub-section (2) of Section 10. It has always been held, and that unanimously, that, claims for such deductions come within the general principles of law and rule in finding out what really represents the gains and profits of a business. It is for that reason that such deductions are claimed as losses incidental to the trade, otherwise known as trade losses.